



DEPARTMENT OF THE NAVY  
OFFICE OF THE GENERAL COUNSEL  
WAS HINGTON, D.C. 20350-1000

28 May 1996

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE NAVY (RD&A)  
DEPUTY, ACQUISITION BUSINESS MANAGEMENT ✓

Subj : PROPOSED REFORMS TO AFFIRMATIVE ACTION IN FEDERAL  
PROCUREMENT

Ref: (a) Statement on Executive Orders for Economic  
Revitalization of 21 **May** 1996, '1996 W.L. 268522 (White  
House)  
(b) DOJ Notice and Invitation for Reactions and Views, 61  
Fed. Reg. 26042-01, 23 May 1996

This is to inform you of major changes that will be  
instituted or have been proposed with respect to affirmative  
action in federal procurement.

1. Empowerment Contracting Program. On 21 May 1996, the  
White House released a statement and executive order, reference  
(a), that establishes a policy to foster growth of Federal  
contractors in economically distressed areas. This order  
requires the Secretary of Commerce, in consultation with other  
agencies, including the Department of Defense, to develop  
policies and procedures to ensure that agencies grant qualified  
large and small businesses incentives to promote business  
activity in areas of economic distress. Such incentives include  
price or evaluation credits in evaluating offers for award in  
unrestricted competitions where such incentives would promote the  
objectives of the policy. This program is intended to  
supplement, and not replace, existing procurement programs. The  
Secretary of Commerce is required to draft implementing  
regulations within 90 days of the date of the order.

2. Department of Justice Proposed Reforms to Affirmative  
Action in Federal Procurement. On 23 May 1996, the Department of  
Justice (DoJ) published in the Federal Register a notice of  
proposed reforms to affirmative action in federal procurement  
(reference (b) ). The notice requests reactions and views on the  
reforms by 22 July 1996.

The reforms would make significant changes in contracting

with small disadvantaged businesses (SDBs) . The changes outlined involve: (1) certification and eligibility; (2) benchmark limitations; (3) mechanisms for increasing minority opportunity; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance. It is intended that these reforms will form a model for amending the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.

Some of the highlights of the proposed changes include:

(1) Agencies will no longer be able to accept self-certifications of SDB status. An agency will certify firms as SDBs pursuant to a new eligibility process, or an agency can enter into an agreement with the Small Business Administration (SBA) to have SBA make all determinations. Certifications pursuant to SBA's "section 8(a)" program will not be affected by this change.

(2) The Department of Commerce will establish "benchmark limitation figures" for each industry and report them to the Office of Federal Procurement Policy (OFPP) for publication and dissemination. Each benchmark figure "will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects. " Agencies will be authorized to use affirmative action programs in contracting only to the extent necessary as established by the benchmark limitation figures.

(3) A "bidding credit" is proposed for SDB prime contractors where use of such a credit would not result in a price that exceeds fair market value by 10%. The maximum allowable "credit" will be tied to the benchmark limitation figures, which will necessarily vary for each industry. The size of the credit for a particular procurement will depend on the extent of the disparity between benchmark limitations and minority SDB participation in federal procurement and industry. Use of such a credit will not be limited to contract awards based solely on price. Credits will be used in lieu of set-asides.

(4) An "evaluation credit" is proposed for non-minority prime contractors that use SDBs in subcontracting. Such "credits" may take various forms such as bonus awards to primes,

but will again depend on the benchmark limitations for each industry.

(5) Where an agency finds its use of credits up to the maximum benchmark limitation to be unnecessary to achieve its goals, an agency could use less credits subject to approval by the Department of Commerce.

The DoJ proposal is lengthy and general in form. It does not discuss the impact on current programs, i.e., when programs that do not fit the model will be rescinded.



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